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No. _____

In The
Supreme Court of the United States

CITY OF CINCINNATI,

Petitioner,

v.

GERALD CASH, CLARA CASH, ROCKY WAYNE ADKISSON, PHILLIP GARCIA, AND GREGORY B. WAHOFF,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Is a procedural due process claim ripe where the injured party did not first pursue adequate state remedies?

2) Are objects without identification left on public property by trespassing individuals constitutionally protected?

3) Is notice in a local newspaper constitutionally sufficient to apprise unknown trespassing homeless individuals of the intended destruction of their possessions left on public property?

LIST OF PARTIES

Petitioner is the City of Cincinnati, Ohio, a municipal corporation. Respondents are Gerald Cash, Clara Cash,[1] Gregory B. Wahoff, Phillip Garcia, and Rocky Wayne Adkisson.

The Hamilton County (Ohio) Department of Adult Probation and Michael L. Walton, Chief Probation Officer, were also parties to the proceeding below. They are separately filing a Petition for Writ of Certiorari.

[1] Gerald Cash and Clara Cash were killed in a fire during the course of the appeal to the Sixth Circuit. A suggestion of death was filed. No estate for either of the Cashes was opened or substituted as a party to the proceeding below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, City of Cincinnati, respectfully prays that a writ of certiorari be issued to review the final judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The decision of the United States District Court, Southern District of Ohio, Western Division, issued on June 24, 2003, App. 13, granted the City's motion for summary judgment. The Opinion of the United States Court of Appeals for the Sixth Circuit, issued November 12, 2004, 388 F.3d 539 (6th Cir. 2004), reversed the decision of the District Court. App. 1. The order of the Court of Appeals denying the City's petition for rehearing en banc was issued on February 25, 2005. App. 24.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 to review the February 25, 2005, order of the United States Court of Appeals for the Sixth Circuit denying the City's petition for rehearing en banc, and the November 12, 2004, order of the Court of Appeals reversing and remanding the decision of the District Court granting the City's motion for summary judgment.

STATUTORY PROVISIONS INVOLVED

This petition presents issues of constitutional law brought by the Respondents pursuant to 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity. . . .

STATEMENT OF THE CASE

The State of Ohio and Hamilton County, Ohio, have an agreement to use County crews, controlled and supervised by the Hamilton County Department of Adult Probation, to cleanup State of Ohio property within the County. The City of Cincinnati and Hamilton County have a similar agreement related to cleanup of City-owned lots. It is uncontroverted that the Respondents were homeless persons trespassing on property owned by the State of Ohio under a viaduct within the City. In 2001, a County crew provided cleanup services for the site. A City police officer protected the vehicle used in the cleanup. Like many municipalities, the City has had crime and public health and safety concerns stemming from the use of public property as encampments by trespassing individuals.

The Respondents asserted federal jurisdiction under 28 U.S.C. §§ 1331 and 1343 and sued the City and Hamilton County alleging that certain objects possessed by them such as clothes, medicine, and small personal effects, were destroyed during the cleanup when workers placed them in a sanitation truck. The Respondents concede that they

do not contest the government's authority to remove the objects left by them as trespassers on public property. Their claim is that the City had an unconstitutional custom of using County crews to destroy objects left on public property without first providing them notice and the opportunity for a hearing.

The District Court granted the City's and the County's motions for summary judgment and ruled that "there was no due process violation committed when the police allegedly disposed of [the plaintiffs'] things without notice or a hearing." App. 18. The District Court reasoned that "there is no due process violation for the random, unauthorized destruction of personal property, whether negligently or intentionally done, if there are adequate post-deprivation remedies available to the plaintiff." App. 18. The District Court determined that the Respondents had "adequate state post-deprivation remedies available for property withheld or destroyed in the form of a replevin action against the City and/or County." App. 18-19. The District Court further held that, assuming the Respondents' possessions were destroyed at a later point in time, after storage by the City, "notice by publication is sufficient where the property owner is not known to government or where his name and address are not readily ascertainable." App. 20.

The Respondents appealed the decision of the District Court to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit reversed and remanded the District Court's decision that the Respondents were not deprived of their right to procedural due process and that notice by publication was sufficient.

REASONS FOR GRANTING THE WRIT

I. THE FEDERAL COURTS HAVE ISSUED CONFLICTING RULINGS WHETHER A FEDERAL PROCEDURAL DUE PROCESS CLAIM IS RIPE WHERE THE INJURED PARTY DID NOT FIRST PURSUE ADEQUATE STATE REMEDIES

The Respondents conceded the availability of a state replevin remedy. They further conceded that they did not pursue that state remedy prior to filing this federal court lawsuit claiming that they were denied their right to procedural due process. In the Respondents' own words: "Ohio law makes it clear that every individual has a right to his or her own personal property and may bring an action in replevin to protect that right. Ohio Rev. Code Section 2737.02 . . . " Damages may be recovered in an action in replevin. *Jedlicka v. Good Mechanical Auto Co.*, 21 Ohio App.3d 19, 486 N.E.2d 121 (1984).

It is well-established that a taking claim is not ripe if a plaintiff failed to first pursue adequate state remedies. *Williamson County Reg. Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). A procedural due process claim is also not ripe if a plaintiff fails to pursue adequate state remedies. However, the Sixth Circuit panel erroneously held that a Fourteenth Amendment claim is not subject to ripeness review. App. 10.[2] The panel asserted: "We therefore have no need to address the ripeness issue." *Id.* By contrast, another panel of the Sixth Circuit previously held

[2] Although the panel represented that the City argued that the Respondents' now-abandoned taking claim was not ripe, in fact the City argued that the Respondents' procedural due process claim was not ripe. In any event, the jurisdictional argument cannot be waived.

that the failure to pursue adequate state remedies meant that a similar claim was not ripe: "Procedural due process and equal protection claims that are ancillary to taking claims are subject to same ripeness requirements, i.e., procedural due process and equal protection claims ancillary to taking claims are not ripe for review unless the plaintiff has met the two elements above [including that if the state had a procedure for obtaining compensation, compensation was sought and denied through that procedure]." *Arnett v. Myers*, 281 F.3d 552, 562 (6th Cir. 2002).

In conflict with the ruling in the case at bar, the United States Court of Appeals for the Ninth Circuit held in *Traweek v. City and County of San Francisco*, 920 F.2d 589, 593-94 (9th Cir. 1990), that the ripeness requirement that applies to taking claims also applies to claims for denial of substantive due process, equal protection, and procedural due process. In *Wax'n Works v. City of St. Paul*, 213 F.3d 1016, 1019 (8th Cir. 2000), the Eighth Circuit also held that ripeness requirements apply to procedural due process claims. Other circuits have also held that a litigant asserting a deprivation of procedural due process must exhaust state remedies before such an allegation states a claim under 42 U.S.C. § 1983. *Flint Electric Membership Corp. v. Whitworth*, 68 F.3d 1309, 1313 (11th Cir. 1995) (per curiam), modified, 77 F.3d 1321 (11th Cir. 1996); *Perez-Ruiz v. Crespo-Guillen*, 25 F.3d 40, 43 (1st Cir. 1994); *New Burnham Prairie Homes, Inc. v. Village of Burnham*, 910 F.2d 1474, 1480 (7th Cir. 1990); *Brady v. Town of Colchester*, 863 F.2d 205, 211 (2nd Cir. 1988).

II. THE FEDERAL COURTS HAVE ISSUED CONFLICTING RULINGS GOVERNING THE CONSTITUTIONAL PROTECTION FOR POSSESSIONS OF TRESPASSING INDIVIDUALS LEFT ON PUBLIC PROPERTY

The Sixth Circuit panel erroneously concluded: "There can be little doubt that the plaintiffs [Respondents] have a protected property interest in their own items of value [left without identification on public property]." App. 5. Based on that fallacious premise, the panel further concluded that the Respondents were entitled to notice and an opportunity for a hearing prior to the alleged destruction of their possessions.

The authorities cited by the panel are inapposite to claims made by individuals who were not known to government officials. *Harris v. City of Akron*, 20 F.3d 1396 (6th Cir. 1994), App. 5, considered real property whose owner was known to government officials, not personal possessions left by trespassers on public property whose owner was not known. *Arnett v. Myers*, 281 F.3d 552 (6th Cir. 2002), App. 5, considered duck blinds in a lake whose owners had prior written contact with Tennessee government officials.

This Court identified two specific factors that govern the reasonableness of a person's expectation of privacy in his property: 1) whether the person was a trespasser, *Rakas v. Illinois*, 439 U.S. 128, 143-44 (1979) (wrongful presence on property prevents an expectation of privacy in a structure built on the property); and 2) whether the property was left in a manner readily accessible and exposed to the public, *California v. Greenwood*, 486 U.S. 35, 40-41 (1988) (finding no reasonable expectation of privacy in garbage bags, or their contents, left for collection outside the

home). These factors also support the conclusion that trespassing individuals' possessions left accessible and exposed on public property do not warrant constitutional protection.

If the government's conduct does not compromise any legitimate interest in privacy, it is not a seizure. *United States v. Jacobsen*, 466 U.S. 109, 123 (1984). Just like the alleged intrusion by a narcotics-detection dog on an individual whose car was stopped for speeding did not "rise to the level of a constitutionally cognizable infringement," *Illinois v. Caballes*, 125 S.Ct. 834, 838 (2005), so the alleged destruction of objects left by trespassers on public property was neither a seizure nor a "constitutionally cognizable infringement" of procedural due process. This Court long ago held that containers abandoned during flight by even known individuals, and then recovered by the government, were not seized. *Hester v. United States*, 265 U.S. 57, 58 (1924). It is illogical to reason that the trespassers' property was not seized, but it was nonetheless protected by procedural due process interests.

The United States Court of Appeals for the Eleventh Circuit held that a governmental entity does not violate an individual's constitutional rights by assisting in the eviction of trespassing homeless individuals and destruction of their possessions. *Church v. City of Huntsville*, 30 F.3d 1332, 1345 (11th Cir. 1994). The Court concluded: "The Constitution does not confer the right to trespass on public lands. Nor is there any constitutional right to store one's personal belongings on public lands." *Id.*

The United States Court of Appeals for the Ninth Circuit similarly ruled that there was no municipal liability when a homeless person's property was confiscated and

destroyed. *Stone v. Agnos*, 960 F.2d 893, 895-96 (9th Cir. 1992). The United States Court of Appeals for the D.C. Circuit considered notice and hearing requirements for the owner of an automobile that was properly licensed and registered. *Propert v. District of Columbia*, 948 F.2d 1327, 1331 (D.C. Cir. 1991). The Court emphasized that the "owner's identity may be easily ascertained." *Id.*, p. 1334.

The Sixth Circuit's decision in the case at bar conferring constitutional protection on possessions left by trespassers on public property conflicts with the rulings of the Ninth, Eleventh, and D.C. Circuits.

III. THE FEDERAL COURTS HAVE ISSUED CONFLICTING RULINGS WHETHER NOTICE BY PUBLICATION IN A LOCAL NEWSPAPER IS CONSTITUTIONALLY SUFFICIENT TO APPRISE UNKNOWN INDIVIDUALS THAT THEIR POSSESSIONS WILL BE DESTROYED

The District Court ruled that "notice by publication is sufficient where the property owner is not known to government or where his name and address are not readily ascertainable." App. 20. The Sixth Circuit panel reversed and remanded for the District Court to determine again whether publication of notice in the local newspaper was "reasonably calculated, in all the circumstances, to appraise [sic] interested parties of the pendency of the action and afford them an opportunity to present their objections. [cite omitted]." App. 10.

In *Higashi v. U.S.*, 225 F.3d 1343, 1348-49 (Fed. Cir. 2000), the Federal Circuit ruled that notice by publication was sufficient to inform persons of Japanese ancestry who were relocated during World War II of United States'

lifting of restrictions. In *Fogel v. Zell*, 221 F.3d 955 (7th Cir. 2000), notice by publication was neither fair nor appropriate in bankruptcy case in which potential claimants were all known purchasers of pipeline manufactured by debtor's predecessor. The Seventh Circuit emphasized that notice by publication "may thus be entirely appropriate when claimants are . . . unknown. . . ." *Id.*, p. 963.

In *United States v. Woodall*, 12 F.3d 791, 794 (8th Cir. 1993), the Eighth Circuit held: "When the government has actual knowledge of an interested party's whereabouts at the time forfeiture is commenced, failure to direct the statutorily required personal notice to that address cannot be considered compliance with either the statute or minimum due process standards." In *U.S. v. 194.08 Acres of Land, More or Less, Situated in St. Martin*, 135 F.3d 1025, 1031 (5th Cir. 1998), the Fifth Circuit held that publication notice is constitutionally inadequate where the owner could be informed by more effective means.

In the case at bar, the trespassing owners of the objects allegedly destroyed by the City were not known. Assuming the objects were otherwise constitutionally protected, the notice provided by the City falls within the procedural due process rule applicable to unknown owners, and not within the rule applicable to known owners.

CONCLUSION

The Supreme Court should grant this Petition for Writ of Certiorari in order to determine whether federal procedural due process claims are ripe even when available adequate state remedies are not used. The Court should grant the Petition to determine whether possessions left

unattended by trespassers on public property are constitutionally protected. The Court should also grant the Petition to determine whether notice by publication in a local newspaper is constitutionally sufficient to apprise unknown individuals that their possessions will be destroyed.

Respectfully submitted,

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388 F.3d 539

United States Court of Appeals, Sixth Circuit. Gerald CASH et al., Plaintiffs-Appellants, v. HAMILTON COUNTY DEPARTMENT OF ADULT PROBATION et al., Defendants-Appellees. **No. 03-3916.**

Argued: Sept. 24, 2004. Decided and Filed: Nov. 12, 2004. Rehearing En Banc Denied Feb. 25, 2005.

ARGUED: Robert B. Newman, Cincinnati, OH, for Appellants. David Todd Stevenson, Hamilton County Prosecutor's Office, Cincinnati, OH, Richard Ganulin, City Solicitor's Office for the City of Cincinnati, Cincinnati, OH, for Appellees.

ON BRIEF: Robert B. Newman, Stephen R. Felson, Cincinnati, OH, for Appellants. David Todd Stevenson, Susan M. Gertz, Hamilton County Prosecutor's Office, Cincinnati, OH, Richard Ganulin, City Solicitor's Office for the City of Cincinnati, Cincinnati, OH, for Appellees.

Before: MERRITT, MOORE, and GILMAN, Circuit Judges.

OPINION

GILMAN, Circuit Judge.

Homeless individuals in Cincinnati, Ohio brought suit pursuant to 42 U.S.C. § 1983 against the city and county, alleging that these entities had violated the plaintiffs' Fifth and Fourteenth Amendment rights to the due process of law by destroying their personal property without notice and without any right to reclaim the items taken. The district court granted summary judgment in favor of the defendants. For the reasons set forth below, we REVERSE the judgment of the district court and REMAND

the case for further proceedings consistent with this opinion.

I. BACKGROUND

A. Factual background

The City of Cincinnati pays Hamilton County to provide city cleanup services. Crews of individuals sentenced to community service and assigned to the Hamilton County Department of Adult Probation's Community Service Program, led by a field supervisor, provide litter collections and ground maintenance of city-owned lots. At issue in this case are the cleanup activities of these crews in areas where homeless individuals reside.

In October of 2001, Gerald Cash, a homeless man, was living under the Fifth Street Viaduct in Cincinnati with his wife, Clara Cash, and his friend, Rocky Wayne Adkisson. One day in mid-October of 2001, the Cashes returned to their living space and found a group of people from the Community Service Program taking away their property. When Gerald Cash asked for his property to be returned, the work crew supervisor allegedly told him: "I'm not allowed to; we have been given orders to clear out under all the bridges."

The Cashes and Adkisson made efforts to locate their property, but were unsuccessful. Clara Cash stated in an affidavit that she called the City of Cincinnati's Sanitation Division and, although she was told that her property would be held for 30 days, she was not told where it was located. Molly Lyons, an organizer with the Greater Cincinnati Coalition for the Homeless, also tried to locate the property that was taken from under the Fifth Street

Viaduct. Lyons said that she called the Sheriff's Office and was told that "the stuff from the homeless sites is thrown away."

B. Procedural background

Five homeless individuals – Gerald Cash, Clara Cash, Rocky Wayne Adkisson, Phillip Garcia, and Gregory B. Wahoff – filed suit against the Hamilton County Department of Adult Probation, the Chief Probation Officer for the Department, and the City of Cincinnati (hereafter referred to collectively as the City and County) in October of 2001. Two of the five plaintiffs have since died. The remaining three (hereinafter the plaintiffs) continue with this suit.

The plaintiffs sought actual damages and injunctive relief, claiming that the City and County violated their Fifth and Fourteenth Amendment rights by destroying their property without affording them the due process of law. They also sought a preliminary injunction requiring the City and County to cease and desist from their alleged practice of seizing and confiscating the property of homeless citizens without notice and a hearing. Subsequently, however, the plaintiffs explicitly stated that they no longer contest the City's authority to remove personal property from municipally-owned areas. They acknowledge in their brief that "[i]t is the *destruction* of property without notice and a hearing which is at the heart of Plaintiff's case." (Emphasis in original.)

In May of 2002, the City and County moved for summary judgment. The district court, a little over a year later, granted these motions and denied the plaintiffs' motion for a preliminary injunction. This appeal followed.

II. ANALYSIS

A. Standard of review

We review a district court's grant of summary judgment de novo. *Therma-Scan, Inc. v. Thermoscan, Inc.*, 295 F.3d 623, 629 (6th Cir.2002). Summary judgment is proper where there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In considering a motion for summary judgment, the district court must construe all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The central issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

B. The alleged constitutional violations of the City and County

The plaintiffs brought suit against the City and County under 42 U.S.C. § 1983, which provides in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

"Section 1983 does not itself create any constitutional rights; it creates a right of action for the vindication of constitutional guarantees found elsewhere." *Braley v. City of Pontiac,* 906 F.2d 220, 223 (6th Cir.1990). The plaintiffs allege that the City and County violated their Fifth and Fourteenth Amendment rights to the due process of law by destroying their personal property without notice and without the right to reclaim the items taken.

This court engages in a two-pronged inquiry when considering a municipal-liability claim. *Doe v. Claiborne County,* 103 F.3d 495, 505 (6th Cir.1996). First, the court must determine whether the plaintiffs have asserted the deprivation of a constitutional right. *Id.* at 505-06. If so, the court must then decide whether the City and County are responsible for that deprivation. *Id.* at 507.

The threshold question is "whether the interest at stake is within the Fourteenth Amendment's protection of liberty and property." *See Arnett v. Myers,* 281 F.3d 552, 564 (6th Cir.2002) (discussing whether hunters had a constitutionally-protected interest in their duck blinds). There can be little doubt that the plaintiffs have a protected property interest in their own items of value. *See Harris v. City of Akron,* 20 F.3d 1396, 1401 (6th Cir.1994) ("Generally, the process that is due before the state may deprive an owner of property includes notice to the owner prior to the deprivation and an opportunity for a predeprivation hearing.").

We must next decide if a genuine issue of material fact exists as to whether the City and County are responsible for the alleged due process violation. Because *respondeat superior* liability is not available as a means of recovery under § 1983, *Doe,* 103 F.3d at 507, the plaintiffs cannot

base their claims against the City and County solely on the conduct of the workers who effected the sweep of homeless areas. *See Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) (holding "that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents"). The plaintiffs must demonstrate that the City and County are themselves the wrongdoers. *Id.*

Municipalities and other bodies of local government may be sued pursuant to 42 U.S.C. § 1983 if they are "alleged to have caused a constitutional tort through 'a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.'" *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988) (citing *Monell*, 436 U.S. at 690, 98 S.Ct. 2018). Section 1983 also "authorizes suit 'for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels.'" *Id.* (citing *Monell*, 436 U.S. at 690-91, 98 S.Ct. 2018). Although a § 1983 plaintiff might not be able to demonstrate that a written policy exists, he or she "may be able to prove the existence of a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law." *Monell*, 436 U.S. at 691, 98 S.Ct. 2018. (citation and quotation marks omitted).

This court has explained that a "custom" for the purposes of § 1983 liability

> must be so permanent and well settled as to constitute a custom or usage with the force of law. In

> turn, the notion of 'law' must include deeply embedded traditional ways of carrying out state policy. It must reflect a course of action deliberately chosen from among various alternatives. In short, a 'custom' is a 'legal institution' not memorialized by written law.

Doe, 103 F.3d at 507-08 (citations and quotation marks omitted). Not only must the plaintiffs show that the City and County as entities caused the constitutional violation, but they "must also show a direct causal link between the custom and the constitutional deprivation." *Id.* at 508. "This requirement is necessary to avoid de facto *respondeat superior* liability explicitly prohibited by *Monell.*" *Id.*

The district court relied exclusively on "the undisputed testimony from the supervising police officers [who stated] that the probationers are instructed to separate personal belongings from trash. Personal belongings are then inventoried in the police property room where they are held, according to one police officer, for one year before they are thrown away." From this "undisputed evidence," the district court reasoned that any destruction of the plaintiffs' property that occurred at the homeless site "would be unauthorized because the probationers are instructed to separate personal belongings from trash."

The district court based its holding on the United States Supreme Court's decisions in *Parratt v. Taylor,* 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), and *Hudson v. Palmer,* 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984), which stand for the proposition that unauthorized deprivations of property by the state are not violations of due process so long as postdeprivation remedies are available. Concluding that any destruction of the plaintiffs' property would have been unauthorized, given

the purported practice of preserving items of value, the court held that no due process violation occurred. The plaintiffs, in other words, were free to sue the City and County after-the-fact either for replevin (to get their property back) or for money damages.

Contrary to the declaration of the district court that the supervising police officers' testimony was "undisputed," the plaintiffs presented substantial evidence suggesting that the City and County had a custom and practice of hauling to the dump all unattended property found at the sites in question. Jeffrey Smith, Field Supervisor for the Hamilton County Adult Probation Department, testified that he had been accompanying adult probationers sentenced to community service on cleanup jobs for ten years. Smith explained that he and his work crews "just follow the Cincinnati Police, and they direct us where to go, and they direct the probationers what to clear and how to do it."

In fact, Smith stated that he is not even present in the immediate area where the cleanup takes place. "I never go up [to] an area," Smith asserted, "I just stay down below and let the officer direct accordingly." Smith testified that the standard cleanup procedure was that a Cincinnati police officer would direct the probationers to put all of the items in bags and then place the bags into a sanitation truck. In direct opposition to the testimony that the district court relied upon, Smith testified that he *never* observed a Cincinnati police officer segregating any of the items and saying that some should be saved. Smith stated that the items are all "hauled off to the trash, to the dump."

Testimony from Cincinnati Police Officer Thomas J. Branigan also supports the plaintiffs' contention that the City had a custom of destroying homeless individuals' property without notice or the right to reclaim the items taken. Branigan testified that he was present for three days of cleanup in mid-October of 2001. The cleanup process, according to Branigan, is swift and indiscriminate. He explained that the probationers "don't rake the property down to get it to a fine clean. They don't use shovels; whatever they put in their hands, put in the bag, and pass it down." Branigan distinguished this procedure in dealing with the homeless from the Police Department's general policy for dealing with personal property found at other locations around the city. In Fountain Square, for example, any unattended property is taken back to the police station, logged, and held as found property. If someone can prove that the property is theirs within "the proper amount of time," the property is returned to that person.

Testimony contrary to that of Smith and Branigan was presented by the City and County. For the purpose of summary judgment, however, all of the evidence must be construed in favor of the plaintiffs as the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). In short, a genuine issue of material fact exists as to whether the property of homeless persons like the plaintiffs was being discarded as part of the City's official policy. The district court therefore erred in granting summary judgment to the City and County on the basis that the relevant testimony was uncontested.

A genuine issue of material fact also exists over whether adequate notice was provided to homeless individuals like the plaintiffs. The established precedent is that individuals whose property interests are at stake are entitled to a "notice and opportunity to be heard." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993). The key inquiry in such circumstances is whether the notice is "reasonably calculated, in all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1953). The City submits that it published a notice in the local newspaper, which was available for anyone in the Cincinnati area to pick up and read. By contrast, the plaintiffs contend that such a notice is per se insufficient, particularly when the educational and financial restraints of the homeless community are considered. This is an issue for the district court to resolve on remand.

C. Ripeness

As part of its defense, City argues that the plaintiffs' Fifth Amendment takings claim is not ripe because the plaintiffs did not pursue adequate state procedures for seeking compensation for the alleged taking. The City contends, therefore, that this claim must be dismissed for lack of subject matter jurisdiction. The plaintiffs, however, have abandoned their Fifth Amendment takings claim and are relying solely on the Fourteenth Amendment as the legal basis for their lawsuit. We therefore have no need to address the ripeness issue.

D. Hamilton County's Eleventh Amendment immunity argument

The County argues that it is entitled to Eleventh Amendment immunity from suit because the Hamilton County Department of Adult Probation is an arm of the common pleas and municipal courts of the state of Ohio. To support this contention, the County cites a number of Ohio statutes. *See* O.R.C. § 2301.27(A)(1) ("The court of common pleas may establish a county department of probation."); § 1901.33(A) ("The judge or judges of a municipal court may appoint one or more . . . probation officers. . . . Probation officers have all the powers of regular police officers and shall perform any duties that are designated by the judge or judges of the court."); § 1901.33(B) ("If a municipal court appoints one or more probation officers, those officers shall constitute the municipal court department of probation unless the court designates other employees as the department of probation for the court.").

The bald assertion that the Department is an arm of the common pleas and municipal courts is insufficient by itself to garner Eleventh Amendment immunity. *See Alkire v. Irving,* 330 F.3d 802, 811 (6th Cir.2003) (rejecting a per se rule granting Eleventh Amendment immunity to county courts). Rather, this argument is one of many factors that must be considered by the district court. We have recognized that the most important factor is "will a State pay if the defendant loses?" *Brotherton v. Cleveland,* 173 F.3d 552, 560 (6th Cir.1999). In *Brotherton,* this court considered whether a county coroner enjoyed Eleventh Amendment immunity. We concluded that "because Hamilton County – rather than the State of Ohio – would satisfy any money judgment against its county coroner, the case does not implicate the Eleventh Amendment." *Id.* at 563; *see*

also S.J. v. Hamilton County, 374 F.3d 416, 420-21 (6th Cir.2004) (rejecting sovereign immunity for a juvenile training facility and noting that the "emphasis on 'who pays' is substantial"); *Alkire,* 330 F.3d at 811 ("[W]e now recognize that the question of who pays a damage judgment against an entity as the most important factor in arm-of-the-state analysis, though it is unclear whether it is the only factor or merely the principal one.").

The County raised the issue of Eleventh Amendment immunity in its motion for summary judgment. Although the district court granted the County's motion, the order provides no findings or analysis pertaining to the Eleventh Amendment. A final resolution of this issue will turn on factual findings regarding whether the Department of Adult Probation is part of the Ohio court system and whether the State or the County would pay damages for a constitutional violation perpetrated by the Department. We therefore remand this issue to the district court for further development.

III. CONCLUSION

For all of the reasons set forth above, we **REVERSE** the judgment of the district court and **REMAND** the case for further proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Gerald Cash, *et al.*, Plaintiffs,	)	
vs.	)	Case No. C-1-01-753
Hamilton County Department of Adult Probation, *et al.*, Defendants.	)	

ORDER

(Filed Jun. 24, 2003)

This matter is before the Court on a motion for a preliminary injunction (Doc. No. 2) filed by Plaintiffs Gerald Cash, Clara Cash, Gregory Wahoof, Phillip Garcia, and Rocky Wayne Addison, and motions for summary judgment filed by Defendants City of Cincinnati (Doc. No. 24) and Hamilton County Department of Adult Probation and Michael Walton (Doc. No. 25). For the reasons which follow, Plaintiffs' motion for a preliminary injunction is not well-taken and is **DENIED**; Defendants' respective motions for summary judgment are well-taken and are **GRANTED**.

I. Background

Plaintiffs in this case are homeless persons who live and keep such possessions as they have underneath bridges and overpasses throughout the City of Cincinnati. *See* Amended Complaint ¶¶ 3, 6, 10. The Defendants are the City of Cincinnati, a municipal corporation organized

under the laws of the state of Ohio, the Hamilton County Adult Probation Department, an agency of Hamilton County, Ohio charged with supervising persons convicted of crimes, and Michael Walton, chief of the Adult Probation Department. *Id.* ¶¶ 4, 5.

The amended complaint contends that the City of Cincinnati and the Adult Probation Department have an agreement wherein the Adult Probation Department provides to the City probationers who have community service obligations. These probationers are then put to work by the City. According to the amended complaint, the City has been using the probationers, under the supervision of a police officer, to conduct "raids" on their bivouac areas when they are absent. The amended complaint alleges that during these "raids," the City confiscates or disposes of their belongings, which mostly consist of clothes, medicine, and small personal effects.

While the City and the Adult Probation Department admit they entered into the agreement as alleged, and that the City conducts clean-up operations in and around these bridges and overpasses, the undisputed testimony from the supervising police officers is that the probationers are instructed to separate personal belongings from trash. Personal belongings are then inventoried in the police property room where they are held, according to one police officer, for one year before they are thrown away. Doc. No. 25, Ex. Boertlein Dep., at 13.

On November 1, 2001, Plaintiffs filed an amended complaint for a preliminary and permanent injunction against the City and the Adult Probation Department pursuant to 42 U.S.C. § 1983. The amended complaint alleges that Defendants' conduct, in raiding their

encampments, and seizing and disposing of their things without notice or a hearing, violates their rights under the Fourth, Fifth, and Fourteenth Amendments. Although the amended complaint appears to challenge the actual seizure of property, in their response to Defendants' motions for summary judgment, Plaintiffs, who have admitted they were trespassers on the areas in question, state that their claims are limited to the following contention:

> Plaintiffs do not contend that Defendants had to conduct a hearing before they removed Plaintiffs' possessions from public land. However, it is plain that before the City *destroyed* the property it could have and should have, pursuant to Constitutional mandates, conducted a hearing.

Doc. No. 26, at 1 (emphasis in original). Therefore, as the Court understands it, Plaintiffs have withdrawn any challenge to the actual practice of conducting the "raids," and now confine their constitutional claims to the alleged destruction of their property without notice and a hearing.

II. Summary Judgement Standard of Review

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). The evidence presented on a motion for summary judgment is construed in the light most favorable to the non-moving party, who is given the benefit of all favorable inferences that can be drawn therefrom. *United States v. Diebold, Inc.*, 369 U.S. 654 (1962). "The

mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (emphasis in original). The Court will not grant summary judgment unless it is clear that a trial is unnecessary. The threshold inquiry to determine whether there is a need for trial is whether "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 250. There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. *Id.*

The fact that the weight of the evidence favors the moving party does not authorize a court to grant summary judgment. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 472 (1962). "[T]he issue of material fact required by Rule 56(c) . . . to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or a judge to resolve the parties' differing versions of the truth at trial." *First National Bank v. Cities Service Co.*, 391 U.S. 253, 288-89 (1968).

Moreover, although summary judgment must be used with extreme caution since it operates to deny a litigant his day in court, *Smith v. Hudson*, 600 F.2d 60, 63 (6th Cir.), *cert. dismissed*, 444 U.S. 986 (1979), the United States Supreme Court has stated that the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part

of the Federal Rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). According to the Supreme Court, the standard for granting summary judgment mirrors the standard for a directed verdict, and thus summary judgment is appropriate if the moving party establishes that there is insufficient evidence favoring the non-moving party for a jury to return a verdict for that party. *Id.* at 323; *Anderson*, 477 U.S. at 250.

Accordingly, summary judgment is clearly proper "against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322. Significantly, the Supreme Court also instructs that the "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion" against a party who fails to make that showing with significantly probative evidence. *Id.*; *Anderson*, 477 U.S. at 250. Rule 56(e) requires the non-moving party to go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." *Id.*

Further, there is no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or similar materials negating the opponent's claim. *Id.* Rule 56(a) and (b) provide that parties may move for summary judgment "with or without supporting affidavits." Accordingly, where the non-moving party will bear the burden of proof at trial on a dispositive issue, summary judgment may be appropriate based solely on the pleadings, depositions, answers to interrogatories, and admissions on file.

III. Analysis

It is clear to the Court that on the facts of this case, even viewed in the light most favorable to Plaintiffs, there was no due process violation committed when the police allegedly disposed of their things without notice or a hearing. The Court discerns two discrete instances when Plaintiffs' property could have been disposed of without notice – at the actual location where the cleanup occurred or after being held in the property room by the police department.

In the former situation, Plaintiffs' due process rights are governed by the U.S. Supreme Court's decisions in *Parratt v. Taylor*, 451 U.S. 527 (1981), and *Hudson v. Palmer*, 468 U.S. 517 (1984). These cases collectively hold that there is no due process violation for the random, unauthorized destruction of personal property, whether negligently or intentionally done, if there are adequate post-deprivation remedies available to the plaintiff. In this case, it is undisputed that the City's intent is not to destroy Plaintiffs' things, but rather to remove them from areas where they do not belong. Any on-the-scene destruction of Plaintiffs' personal property would be unauthorized because the probationers are instructed to separate personal belongings from trash. Any deviation from these instructions by the probationers, whether done negligently because the probationer was not able to distinguish between property and trash, or whether done intentionally by the probationer, would certainly be a random, unforeseeable occurrence with respect to any individual item. *See Zinermon v. Burch*, 494 U.S. 113, 136 (1990) (holding the rule in *Parratt* and *Hudson* applies when the deprivation is unpredictable). Moreover, in this situation, Plaintiffs have adequate state post-deprivation remedies available

for property withheld or destroyed in the form of a replevin action against the City and/or County. *E.g., Bernad v. City of Lakewood*, 747 N.E.2d 838 (Ohio Ct. App. 2000) (replevin action against city for return of gun collection confiscated by police); *State ex rel. Jividen v. Toledo Police Dept.*, 679 N.E.2d 34 (Ohio Ct. App. 1996) (stating the proper method to compel return of property wrongfully held is to file a replevin action); *see* 19 Ohio Jur. 3d Conversion & Replevin § 110 (" [I]f the defendant no longer has possession of the property, the replevin action will proceed as one for damages only."). Thus, because in the on-site context, any destruction of Plaintiffs' property would be random and unforeseeable, and because Plaintiffs have available adequate post-deprivation remedies, Plaintiffs have failed to state a claim for violation of due process.

The second question is, once the police have taken Plaintiff's property and have moved it to the property room for storage, what notice, if any, are Plaintiffs due before their belongings are disposed of? Before attempting to answer this question, however, the Court notes that it is debatable whether Plaintiffs have created an issue of material fact that the City has destroyed the property that was removed from their campsites. Only a cursory comparison between the items listed as being taken in the amended complaint and the items logged into the police property room at the relevant time indicates that there is a substantial overlap between the two lists. *Compare* Amended Complaint ¶¶ 8-11, *with* Doc. No. 26, Newman Aff. Ex. 1 (Property Room Inventory Log from October 2001).[1] In other words, there are many things listed on the

[1] For instance, among the items the amended complaint alleges were seized or destroyed by the police were the following: Nike gym

(Continued on following page)

police inventory sheet which could be the items Plaintiffs now claim were destroyed. Since Plaintiffs have apparently never taken the time to go to the police department to attempt to identify and/or reclaim their belongings, there is a substantial question as to whether Plaintiffs have carried their burden of demonstrating an actual deprivation of property at the hands of the City.

The Court will assume for the moment, however, that Plaintiffs' belongings were destroyed as they claim. The Due Process Clause requires that notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Notice by publication is generally inadequate under the Due Process Clause where the property owner is known to the government or where his name and address are readily ascertainable. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 797 (1983). The inverse of this statement is that notice by publication is sufficient where the property owner is not known to government or where his name and address are not readily ascertainable.

In this case, Plaintiffs, as homeless persons, are by definition not readily identified or located by government officials. They have no fixed location where they might be

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shoes, a backpack, jeans, a sleeping bag, boots, a folding chair, a cell phone, cash, a camera, a bible, medication, toiletries, clothes, compact discs, and photographs. The police inventory log shows that the following items were logged into the property room: 6 cell phones, personal papers, 4 photos, benadryl capsules, compact discs, blue jeans, a coat, a jacket, shoes, t-shirts, duffle bags, blankets, various clothing items, avalide tablets, assorted amounts of cash, one disposable camera, one pair of black Nike shoes, and a red and black metal chair.

readily found by the government or to where specific notice might be sent or posted. The items collected by the police department are mostly generic things, such as clothes, which do not lend themselves to being traced back to the owner. Therefore, the Court finds that notice by publication is sufficient, under the circumstances of this case, to apprise Plaintiffs of the disposition of their belongings.

The City's procedures for disposing of unclaimed property are governed by either Ohio Revised Code § 737.29, *et seq.* or Ohio Rev. Code § 2933.41. Regarding notice, § 737.32 provides:

> Except as otherwise provided in this section and unless the property involved is required to be disposed of pursuant to another section of the Revised Code, property that is unclaimed for ninety days or more shall be sold by the chief of police of the municipal corporation, marshal of the village, or licensed auctioneer at public auction, after notice of the sale has been provided by publication once a week for three successive weeks in a newspaper of general circulation in the county.

Ohio Rev. Code § 737.32. Section 2933.41 controls disposition of lost, abandoned, or confiscated property in the custody of a law enforcement agency, and provides:

> A law enforcement agency that has property in its possession that is required to be disposed of pursuant to this section shall make a reasonable effort to locate the persons entitled to possession of the property in its custody, to notify them of when and where it may be claimed, and to return the property to them at the earliest possible time. In the absence of evidence identifying

> persons entitled to possession, it is sufficient notice to advertise in a newspaper of general circulation in the county, briefly describing the nature of the property in custody and inviting persons to view and establish their right to it.

Ohio Rev. Code § 2933.41(B). In fact, the City's procedures for disposition of "found property" specifically incorporate §§ 737.29 (and by implication § 737.32)[2] and 2933.41. *See* Doc. No. 24, Ex. E, at § D2. As can be seen, both of these statutes require notice by publication in local newspapers before property in the custody of the City or the police department can be disposed of. As these sections pertain here, they satisfy the requirements of due process because notice by publication is the only reasonable means to make these particular Plaintiffs aware that their belongings are about to be discarded or liquidated.

In this case, Plaintiffs bear the burden of demonstrating that the Defendants abridged a property interest without the appropriate process. *LRL Properties v. Portage Metro Housing Auth.*, 55 F.3d 1097, 1108 (6th Cir. 1895). As noted above, whether Plaintiffs have even made a prima facie showing of a deprivation is doubtful. Although Plaintiffs have shown that they made a few inquiries about their things and perhaps got the run around, even a cursory review of the police property log reveals that their things were most likely received into the property room. All they had to do was go down to the property room to identify and reclaim their possessions. In any event, Plaintiffs have not demonstrated or raised any issue of

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[2] *See United States v. Stauffer Chem. Co.*, 684 F.2d 1174, 1184 (6th Cir. 1982) (stating all provisions of a statute should be read *in pari materia*).

fact that the City or the police failed to follow the procedures outlined above, which the Court has found satisfy due process, if in fact their possessions were liquidated. Thus, Plaintiffs have failed to show that Defendants committed any due process violation.

Conclusion

In conclusion, under the circumstances of this case, any on-site destruction of Plaintiffs' belongings was an unauthorized, random, and unforeseeable event for which the state has provided an adequate post-deprivation remedy. Therefore, Plaintiffs have failed to state a claim for a due process violation with regard to the alleged on-site disposition of their property. With regard to items actually taken into custody, the notice by publication procedures for disposition of this property comport with due process because the names and addresses of Plaintiffs are not readily ascertainable by the government. Moreover, Plaintiffs have not demonstrated that Defendants failed to follow these procedures if in fact their belongings were disposed of.

Accordingly, Defendants' respective motions for summary judgment are well-taken and are **GRANTED**. Plaintiffs' motion for a preliminary injunction is not well-taken and is **DENIED**. **THIS CASE IS CLOSED.**

IT IS SO ORDERED

Date 6/19/03

/s/ [Illegible]
Sandra S. Beckwith
United States District Judge

No. 03-3916

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GERALD CASH, ET AL., Plaintiffs-Appellants,	)	
v.	)	ORDER
HAMILTON COUNTY DEPARTMENT OF ADULT PROBATION, ET AL., Defendants-Appellees.	)	(Filed Feb. 25, 2005)

BEFORE: MERRITT, MOORE, and GILMAN, Circuit Judges.

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the case. Accordingly, the petitions are denied with the following two corrections to the opinion: page 3, line 2, change the word three to two; page 3, line 3, change the word two to three.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk